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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

ROBERT and PATRICIA STOKES,

Plaintiffs/Appellants/
Cross-Appellees.

Supreme Court Docket No. 119074

vs.

Court of Appeals No. 216334

MILLEN ROOFING COMPANY,

Defendant/Appellee/
Cross-Appellant.

Circuit Court Case No. 94-3123-NZ
Hon. Donald A. Johnston III

CROSS-APPELLEES' BRIEF ON APPEAL

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STATEMENT OF THE BASIS OF JURISDICTION

In an order dated November 20, 2001, this Court granted, in part, Defendant/Cross-Appellant's application for leave to appeal from the March 9, 2001 decision of the Court of Appeals. *Stokes v Millen Roofing Co*, 465 Mich 909 (2001). The order granting Defendant/Cross-Appellant's application for leave to appeal was expressly limited to "the first issue raised in the application for leave to appeal as cross-appellant." *Id.* Therefore, this Court has jurisdiction over the issues presented in Defendant/Cross-Appellant's cross-appeal to the extent that those issues were previously raised in the first issue of Defendant/Cross-Appellant's application for leave to appeal. MCR 7.301(A)(2).

STATEMENT OF THE QUESTION INVOLVED

I. DID THE TRIAL COURT ERR IN SUMMARILY DISMISSING DEFENDANT'S ORIGINAL COUNTER-COMPLAINT FOR LEGAL RELIEF ON THE GROUND THAT DEFENDANT WAS NOT A PROPERLY-LICENSED RESIDENTIAL BUILDER?

The Court of Appeals answered "No."

Defendant/Appellee/Cross-Appellant answers "Yes."

Plaintiff/Appellant/Cross-Appellee answers "No."

COUNTER-STATEMENT OF FACTS

A. Factual Overview

As more-fully set forth in the Statement of Facts section of the brief Robert and Patricia Stokes filed as appellants, this case involves a dispute over the construction of a slate roof on the Stokes' residence in 1994. Defendant Millen Roofing built the slate roof pursuant to a contract with the Stokes. (Cross-Appellants Appendix, p 167b; Stokes Appendix, pp 69a-71a.[1]) It is undisputed that, at all relevant times, Millen Roofing was not licensed by the State of Michigan as residential builder.

As the work on the roof was drawing to a close, a dispute arose regarding certain alleged change orders and the total amount of the contract. Millen Roofing believed that it should be paid approximately $50,000 over the original contract price as compensation for laying a portion of the roof twice (due to a mistake in the initial installation). (Cross-Appellant's Appendix, pp 169b-170b). Not wishing to pay twice for one roof, the Stokes tendered the balance of the original contract price. In response, Millen Roofing rejected the Stokes offer and filed a construction lien against the Stokes' residence. (Stokes Appendix, pp 77a-78a; Cross-Appellant's Appendix, pp 178b-179b). The Stokes then brought this action alleging breach of contract and seeking to discharge the lien. Millen Roofing filed a counterclaim seeking to foreclose on the lien and to recover damages for breach of contract and quantum meruit. (Cross-Appellant's Appendix, pp 1b-9b; 19b-25b.)

On November 11, 1994, the Stokes moved to discharge the lien and moved for summary disposition of Millen Roofing's counterclaim pursuant to MCR 2.116(C)(8) & (10). In support of

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[1] "Stokes Appendix" refers to the Appendix filed by the Stokes as appellants in their direct appeal.

their motions, the Stokes argued that Millen Roofing could not file a valid claim of lien or recover under the roofing contract, because it was not properly licensed by the State of Michigan. (Cross-Appellant's Appendix, pp 40b-53b.) Millen Roofing filed a brief in opposition to the Stokes motions on December 1, 1994. Millen Roofing argued (1) that it did not need a license, because a licensed general contractor and licensed architect were also present "on the job," (2) that the doctrine of equitable estoppel should prevent the Stokes from asserting Millen Roofing's lack of a license as a defense, and (3) that its lien was valid. (Cross-Appellant's Appendix, pp 58b-69b.) On the following day, December 2, 1994, the trial court granted the Stokes' motion for summary disposition based on the undisputed fact that Millen Roofing did not have a residential builders license. In the same order, the trial court also discharged Millen Roofing's construction lien. (Cross-Appellant's Appendix, pp 106b, 112b-113b.)

Immediately after the trial court's December 2, 1994 order, the Stokes' breach of contract cause of action remained the only unresolved claim. This did not last long, however, as the trial court soon granted Millen Roofing leave to file and amended counter-complaint. (Cross-Appellant's Appendix, pp 114b-124b). Although not at issue in this cross-appeal, the trial court eventually dismissed most of Millen Roofing's amended counter-complaint, leaving for trial only Millen Roofing's equitable claim to "reclaim" its roof "and restore the situation to the status quo ante."[2] (Stokes Appendix, pp 148a-175a; Cross-Appellant's Appendix, p 182b). After a bench trial, the trial court concluded that Millen Roofing was entitled to equitable relief on this claim. As a remedy, it ruled that the Stokes could choose between either (1) paying Millen Roofing the balance of the

[2] Prior to trial, the Stokes' voluntarily dismissed their breach of contract action against Millen Roofing. Thus, for all intents and purposes, Millen Roofing was the "plaintiff" at trial.

contract price, or (2) allowing Millen Roofing to physically remove the Stokes' roof in exchange for the amount of money already paid toward the contract price. (Cross-Appellant's Appendix, pp 173b-186b, 192b-196b.)

Both parties appealed the trial court's order. As set forth in the Stokes' brief on direct appeal, the Court of Appeals affirmed the trial court in all respects, albeit reluctantly so with respect to the trial court's award of equitable relief to Millen Roofing. With respect to Millen's cross-appeal, the Court of Appeals explained as follows:

> Defendant first argues that the trial court erred in dismissing its countercomplaint against plaintiffs and dissolving its construction lien on plaintiffs' property. We disagree. Under MCL 339.2412; MSA 18.425(2412), as an unlicensed builder, defendant had no legal right to bring or maintain an action against plaintiffs, including filing a countercomplaint. [*Republic Bank v Modular One LLC*, 232 Mich App 444, 449; 591 NW2d 335 (1998); *Parker v McQuade Plumbing & Heating, Inc.*, 124 Mich App 469, 471; 335 NW2d 7, (1983)]. Likewise, defendant's construction lien was invalid because defendant was unlicensed at the time it performed the work on plaintiff's property. MCL 570.1114(b); MSA 26.316(114)(b). Further, the trial court allowed defendant to amend its countercomplaint and proceed with equitable claims. We find no error in the trial court's decision to dismiss defendant's legal claims and dissolve its construction lien.
>
> Defendant also argues that it is exempt from the requirements of the residential builders licensing act because it contracted with plaintiff Patricia Stokes, who was acting as a general contractor and who was not subject to the licensing requirement. Defendant bases this argument on MCL 339.2403(b); MSA 18.425(2403)(b), which allows a property owner to act as a residential contractor with respect to the owner's own residential property without obtaining a license. According to defendant's theory, it was a subcontractor to the unlicensed general contractor, Patricia Stokes, and because the general contractor was not required to be licensed, it was not required to be licensed either. When defendant advanced this theory at trial, the court found that Patricia Stokes was not acting as a general contractor and that, even if she was assuming that role, it would not eliminate defendant's licensing requirement. We find no error in the trial court's conclusion with respect to this issue.
>
> Although defendant is correct that a property owner may act as a residential

> contractor with respect to the owner's own property without the benefit of a license, defendant is unable to cite any authority supporting its position that because the general contractor has no requirement for a license, the subcontractor is also exempt from the licensing requirements. The act lists several exceptions to the licensing requirement; however, there is no exception for subcontractors to unlicensed property owners within the plain language of MCL 339.2403; MSA 18.425(2403). Because the Legislature did not see fit to include an exception for defendant's situation, we will not read such an exception into the statute. The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts the laws that govern our behavior. *Lumley v Univ of Michigan Bd of Regents*, 215 Mich. App. 125, 129-130; 544 N.W.2d 692 (1996). [*Stokes v Millen Roofing Co*, 245 Mich App 44, 59-60; 627 NW2d 16 (2001).]

The Stokes filed an application for leave to appeal from the Court of Appeals decision to uphold the trial court's award of equitable relief to Millen Roofing. Millen Roofing, in turn, filed an application for leave to appeal as cross-appellant. This Court granted the Stokes' application in full and granted Millen Roofing's cross-application in part. On cross-appeal, Millen Roofing seeks reversal of the trial court's order dismissing its original counter-complaint for legal relief.

B. <u>Objections to Millen Roofing's "Statement of Material Proceedings and Facts"</u>

Most of the "facts" alleged in Millen Roofing's "Statement of Material Proceedings and Facts" are irrelevant. In this cross-appeal, Millen Roofing is challenging only the trial court's December 2, 1994 order granting the Stokes' first motion for summary disposition.[3] Accordingly, the only truly relevant facts are those in the pleadings or otherwise presented to the trial court *before* the trial court's December 2, 1994 order.[4] Thus, even assuming Millen Roofing could prove, for

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[3] See, *infra*, Part A of the "Argument" section addressing the scope of the cross-appeal.

[4] MCR 2.116(G)(5) states:

> The affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed in the action or submitted by the parties*, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only

instance, that the Stokes are "litigious people" and persuade this Court that the Stokes' litigiousness would have been legally relevant (had it been properly presented to the trial court), this "fact" would not be relevant for purposes of this cross-appeal, because it was not alleged in Millen Roofing's counterclaim or properly presented to the trial court by way of affidavit or other documentary evidence. Almost all of the"facts" included in Millen Roofing's Statement of Material Proceedings and Facts suffer from this malady.

To determine whether a "fact" asserted by Millen Roofing was properly before the trial court, this Court need only review the initial pleadings and the materials attached to the Stokes' first motion for summary disposition and Millen Roofing's December 1, 1994 response. Under this standard, all of Millen Roofing's "facts" taken from the trial testimony and trial exhibits are irrelevant. These include: (1) the Stokes' alleged litigiousness, (2) the circumstances of Stokes' action against Doug Sumner Builder, Inc., (3) the alleged supervision of Millen Roofing's work by other contractors,(4) Matt Millen's self-serving testimony that Patricia Stokes made representations to him that she would take care of the licensing, and (5) the unsupported allegations regarding

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> the pleadings may be considered when the motion is based on subrule (C)(8) or (9). [Emphasis added.]
>
> MCR 2.116(G)(6) states:
>
> > Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

Taken together, these rules provide that a trial court ruling on a motion for summary disposition may consider *only* the pleadings and "substantively admissible" facts presented by way of affidavit or other documentary evidence. Logic further dictates that facts occurring *after* the trial court's ruling cannot be relevant to the merits of the ruling.

Patricia Stokes' intentions. Because these "facts" were not before the trial court when it granted the Stokes' motion for summary disposition on December 2, 1994, they should have no bearing on this Court's resolution of Millen Roofing's cross-appeal.

SUMMARY OF ARGUMENT

On cross appeal, Millen Roofing challenges only the trial court's December 2, 1994 order granting the Stokes' motion for summary disposition and discharging Millen Roofing's construction lien. With respect to that order, Millen Roofing's efforts on cross-appeal are directed toward challenging only that portion of the December 2, 1994 order granting the Stokes' motion for summary disposition. On that front, Millen Roofing's position is flawed by its reliance on facts and legal arguments that were not presented to the trial court. Aside from the preservation problems, Millen Roofing's various legal arguments cannot withstand scrutiny. Because MCL 339.2412(1), hereinafter § 2412, prohibits an unlicensed residential builder from bringing an action to recover compensation, the trial court did not err in granting the Stokes' motion for summary disposition.

To the extent Millen Roofing's brief on cross appeal calls into question the trial court's decision to discharge of its construction lien without requiring the Stokes to pay compensation, the Stokes maintain that the trial court did not err. There are three prongs to this part of the Stokes' argument.

First, Millen Roofing never argued that equity required the Stokes to pay it compensation as a "precondition" to the discharge of the lien. Because the issue was not raised in the trial court, it should be deemed forfeited or waived on appeal.

Second, if the trial court, acting *sua sponte*, had required the Stokes to pay compensation to Millen Roofing as "precondition" to the removal of the lien, its action would have defeated the statutory policy precluding unlicensed residential builders from suing to recover compensation. Equity will not permit a party to accomplish indirectly that which the law prohibits it from accomplishing directly.

Third, the imposition of a condition requiring the Stokes to pay compensation to Millen Roofing in exchange for the discharge of the lien would have violated the "clean hands" maxim of equity. By performing the work on the Stokes' roof without the proper license, Millen Roofing was guilty of a criminal violation. Also, because Millen Roofing did not have a license, its construction lien (based on the unlawful residential construction) was invalid *ab initio* under § 114 of the Construction Lien Act, MCL 570.1101 *et seq*. To allow Millen Roofing to receive compensation *as a matter of equity* based on an illegal act and an invalid lien would defy logic.

ARGUMENT

A. The Scope of Millen Roofing's Claim on Cross-Appeal

The precise scope of Millen Roofing's claim on cross-appeal is difficult to pin down. In its single statement of the "question" involved, Millen Roofing refers to "the trial court's summary judgments" and also to the discharge of the construction lien against the Stokes property. This would seem to suggest that Millen Roofing meant to challenge *all* pretrial orders dismissing its claims as well as the order discharging its construction lien. However, in the section of its cross-appeal brief labeled "Conclusion and Relief Requested," Millen Roofing requests only that this Court reverse "that portion of the lower court's decision which dismissed Defendant's counter

complaint for legal relief." By rule, the appellant must state, distinctly, the relief requested. MCR 7.306(A); MCR 7.212(C)(8). Here, Millen Roofing seeks no relief regarding the discharge of its construction lien.

Moreover, while the trial court dismissed Millen Roofing's legal claims on multiple occasions, a quick review of Millen Roofing's Appendix demonstrates that Millen Roofing is challenging *only* the trial court's December 2, 1994 order granting the Stokes' *first* motion for summary disposition. Pursuant to MCR 7.307(A), the appellant's appendix must include (1) a list of the "relevant" trial court docket entries, (2) the trial court order "in question," and (3) any "relevant" finding or opinion of the trial court. In compliance with this rule, Millen Roofing has listed the December 2, 1994 order granting the Stokes' first motion for summary disposition as a relevant docket entry and included a copy of the order and bench opinion in its Appendix. (Cross-Appellant's Appendix, pp iii, 90b-113b).

Importantly, however, Millen Roofing has *not* listed the trial court's September 29, 1995 order granting the Stokes' *second* motion for summary disposition as a "relevant" docket entry. Nor has Millen Roofing included the trial court's September 29, 1995 order granting the Stokes' second motion for summary disposition as an order "in question." Moreover, Millen Roofing's brief on cross-appeal does not addresses the basis for the trial court's ruling on the Stokes' second motion for summary disposition. For these reasons, any objection Millen Roofing might have had with respect to merits of the trial court's September 29, 1995 order should be deemed abandoned. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998) ("A party may not leave it to this Court to search for a factual basis to sustain or reject its position."); see

also *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (an appellant is required to brief the factual basis of its claim on appeal); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984) (an appellant must "adequately prime the pump" before the "appellate well" will "begin to flow").

Given the limited scope of Millen Roofing's cross-appeal, the Stokes will confine their response to the merits of the trial court's December 2, 1994 order. To the extent Millen Roofing's argument on cross-appeal addresses the merits of the trial court's award of equitable relief to Millen Roofing, such argument is misplaced. Millen Roofing never filed an appeal from the favorable award of equitable relief. To the contrary, Millen Roofing is now asking to have that award *affirmed*. As such, the argument does not belong in a cross-appeal.

B. Standard of Review

The Stokes moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10). (Cross-Appellants Appendix, pp 40b-41b). In granting the motion, the trial court did not specify the subrule upon which it relied. (Cross-Appellants Appendix, pp 112b-113b). The Supreme Court reviews de novo a trial court's decision on a motion for summary disposition. E.g. *Hazle v Ford Motor Co,* 464 Mich 456, 461; 628 NW2d 515 (2001).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's claim, on the pleadings alone, to determine whether the Plaintiff has stated a claim on which relief may be granted. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Id.* "A motion for summary disposition brought under MCR 2.116(C)(10) tests

the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Hazle, supra.*

C. Response to Millen Roofing's Arguments

1. *Article 24 of the Occupation Code does require a license.*

This section responds the argument on page 10 of Millen Roofing's brief that the words "license required by this article," as used in § 2412, do not refer to any license because "Article 24 does not require a license."

As an initial (and controlling) matter, this argument is without merit because it was not preserved for appellate review. In response to the Stokes' motion for summary disposition, Millen Roofing never argued that Article 24 did not require a license. Absent unusual circumstances, issues not raised before the trial court may not be raised on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); see also *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987) (explaining the general rule that failure to timely raise an issue at trial waives review of the issue on appeal). "The [raise or waive] rule is based upon the nature of the adversary process and the need for judicial efficiency." *Napier, supra* at 228. It would be inefficient and unfair to permit litigants that stand silently at trial to seek relief on appeal by raising questions that could have and should have been raised in time for corrective judicial action by the trial court. *Id.*, citing *Taylor v Lowe*, 372 Mich 282, 284; 126 NW2d 104 (1964). Because Millen Roofing did not make this argument before the trial court, it should not be permitted to do so now.

Millen Roofing's argument also lacks substantive merit. If Article 24 does not require a residential builders "license," then to what "license" does the language in § 2412 refer? Millen Roofing does not, and cannot, answer this question. Instead, Millen Roofing simply states that "[a] review of the Sections under Article 24 shows that there is no requirement for licensing in Article 24." To the contrary, every section of Article 24 specifically refers to a license requirement. See MCL 339.2401(b)(ii) (referring to license "under this article"); MCL 339.2402; MCL 339.2403 (exceptions to license requirement); MCL 339.2404 (license application); MCL 339.2405 (license of corporation); MCL 339.2406 (nonresident license requirement); MCL 339.2407; MCL 339.2409 (suspension of license); MCL 339.2410 (examination of license holders); MCL 339.2411 (revocation of license); MCL 339.2412.

Moreover, a review of the entire Occupational Code demonstrates that the "license" referred to in § 2412—and the rest of Article 24—is that required by subsection 601(1) of the code, which states as follows:

> A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation

Article 24 regulates residential builders. Subsection 2401(a) defines "Residential Builder" as a person engaged in the construction of a residential structure for compensation. The "department" is the department of licensing and regulation. See MCL 339.104(1). Therefore, the license "required by" Article 24 (which regulates residential builders) is a residential builders license.

2. *Millen Roofing's Counterclaim was properly barred as an action seeking "compensation."*

This section responds to Millen Roofing's contention on pages 10-12 of its brief that § 2412 bars only suits for "compensation."

It is not clear why Millen Roofing is making this argument on *cross-appeal*, because the argument seems to be offered in support of the trial court's decision to award equitable relief to Millen Roofing, which was affirmed by the Court of Appeals. (Indeed, Millen Roofing concedes on page 12 of its brief that the trial court granted summary disposition on its "compensation claims.") If that is the case, then this argument does not belong in Millen Roofing's cross appeal, but rather in response to the Stokes' brief on appeal in the other portion of this case.

Moreover, this argument was not preserved for appellate review. See *Peterman, supra* at 183; *Napier, supra* at 227-229. In responding to the Stokes motion for summary disposition, Millen Roofing did not argue that the claims set forth in its counter-complaint were excluded from the operation of § 2412 because they sought something other than "compensation" for building the roof. To the contrary, Millen Roofing argued only that it did not need a license, because a licensed general contractor and licensed architect were also present "on the job," and that the doctrine of equitable estoppel should prevent the Stokes from asserting Millen Roofing's lack of a license as a defense. (Cross-Appellant's Appendix, pp 58b-69b).

In any event, the Stokes take issue with Millen Roofing's description of "compensation" as meaning something "above and beyond what you started out with." There is no support for this view. Webster's New World College Dictionary (4th ed), p 297, defines "compensation," in part, as "anything given as an *equivalent*," and it defines "compensate" as meaning "to make *equivalent* or

suitable return to." (Emphasis added.) Likewise, the dictionary selected by Millen Roofing defines "compensation" as "something given or received as an *equivalent* for services, debt, loss, injury, etc." (Millen Roofing's brief on cross-appeal, p 11, emphasis added).

Furthermore, as set forth in the Stokes' brief on direct appeal, the primary problem with the trial court's award of "equitable" relief to Millen Roofing is not that the equitable recovery of materials necessarily amounted to "compensation," but rather that the award improperly undermined the legal scheme put into place by the Legislature. The law prohibits unlicensed builders from bringing actions to recover "compensation" in exchange for residential construction work. Therefore, a court in equity may not circumvent this policy by ordering, instead, the "equitable" recovery of materials. See, e.g. *Daley v City of Melvindale*, 271 Mich 431, 436; 260 NW2d 898 (1935) (explaining that equity will not permit indirectly that, which because of public policy, cannot be accomplished directly).

3. *The alleged presence of a licensed contractor on the site is irrelevant.*

This section responds to Millen Roofing's wholly-unsupported suggestion, set forth on page 12 of its brief, that the "purposes" of Article 24 of the Occupational Code were met in this case, because "at all times" there was "a licensed builder involved in supervising the work," and "one or more licensed architects."

Simply put, Millen Roofing seeks to rely on an "exception" to the licensing requirement that does not exist. The limited statutory exceptions to the license requirement are set forth in § 2403 of the Occupational Code. Review of that section reveals that the Legislature has created no exception for builders "supervised" by licensed contractors. The closest statutory exception to

Millen Roofing's argument is subrule (e) of § 2403, which provides an exception to the licensing requirement for "[a] person other than a salesperson who engages *solely* in the business of performing work and services *under a contract with* a residential builder or residential maintenance and alteration contractor licensed under this article." (Emphasis added.) Clearly, this exception does not apply to Millen Roofing, because Millen Roofing was not working "under a contract" with Summit Construction.

As this Court is well aware, the judiciary may not advance an asserted statutory "policy" at the expense of the plain statutory text. E.g. *Calovecchi v Michigan*, 461 Mich 616, 624; 611 NW2d 300 (2000); *Ramsey v Kohl*, 231 Mich App 556, 562-563; 591 NW2d 221 (1998). The most reliable indicator of statutory policy is the text of the statute itself. See, e.g., *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000). In this case, the text does not permit recognition of the "exception" asserted by Millen Roofing.

4. ***The Stokes did not use § 2412 as a "sword."***

This section responds to Millen Roofing's suggestion, as set forth on page 12-13 of its brief, that the Stokes have wrongly used § 2412 as a "sword" rather than as a "shield."

The issue on cross appeal is whether the trial court erred in summarily dismissing Millen Roofing's claims for relief *against* the Stokes. The Stokes relied on § 2412 *as a defense* to these claims. Accordingly, the Stokes used § 2412 as a "shield" rather than as a "sword." Cf. *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471 (1983) (explaining that the statute removes an unlicensed contractor's power to sue, but not its power to defend a breach of contract suit on its merits).

Millen Roofing also suggests that the Stokes somehow intended to use § 2412 to obtain a "free" roof. Because Millen Roofing failed to present substantively admissible evidence to the trial court in support of such an inference, this suggest is irrelevant. More importantly, it is not supported by the facts. It is undisputed that, prior to this litigation, *the Stokes tendered payment of the full contract price*. Millen Roofing refused payment because it sought additional compensation for laying a portion of the roof twice. (Stokes Appendix, pp 77a-78a; Cross-Appellant's Appendix, pp 178b-179b). Had the Stokes' intended to take advantage of § 2412 to obtain a "free" roof, they certainly would not have tendered the full contract price.[5] Now, as a result of this prolonged litigation, the roof has been anything but "free."

5. Millen Roofing was not the "owner," and Patricia Stokes was not the "general contractor."

This section responds to Millen Roofing's argument, set forth on pages 13-17 of its brief, that it comes within the exception to the license requirement contained in MCL 339.2403(b).

Like many of Millen Roofing's other arguments, this issue was not raised before the trial court in response to the Stokes' motion for summary disposition. (Instead, Millen Roofing sought to rely on a license purportedly held by Summit Construction.) Accordingly, this argument has not been preserved for appeal and must be deemed waived. See *Peterman, supra*; *Napier, supra*. Additionally, none of the "facts" relied upon by Millen Roofing in support of this argument were presented to the trial court before the December 2, 1994 order granting the Stokes' motion for summary disposition.

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[5] Incidentally, the trial court determined that Millen Roofing was not, as a matter of contract law, entitled to payment for the amount associated with re-laying a portion of the roof. (Cross-Appellant's Appendix, p 170b).

The argument that Patricia Stokes was a general contractor also lacks substantive merit. Subsection (b) of § 2403 provides that a license is not required by a person engaged in residential building if the person is "[a]n owner of property, with reference to a structure on the property for the owner's use and occupancy." By its plain terms, this exception does not apply to Millen Roofing, because Millen Roofing was not an owner of the property.

Conceding as much, Millen Roofing makes the strained argument that, as "subcontractor" to Patricia Stokes (who Millen Roofing describes as being *both* a "general contractor" and an "owner" exempt from the licensing requirement), it should be covered by *Ms. Stokes'* exemption under § 2403(b). One flaw with this argument is Millen Roofing's description of Ms. Stokes as the "general contractor." Although Article 24 does not define the term "general contractor," the Construction Lien Act defines "general contractor" as "a contractor who contracts with an owner or lessee to provide, directly or indirectly through contracts with subcontractors, suppliers, or laborers, substantially all of the improvements to the property described in the notice of commencement." MCL 570.1104(6). Under this definition, a "general contractor" must *contract* with the owner. Likewise, Black's Law Dictionary (7th ed.), defines "general contractor" as "[o]ne who *contracts* for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all work." Because Ms. Stokes did not "contract" with the owner for the roof project, she was not a "general contractor." Ms. Stoke, like her husband, was the owner of the property. Because Millen Roofing was *not* the owner of the property, it does not come within the exception set forth in MCL 339.2403(b).

6. *Millen Roofing's argument offered in support of the trial court's "equitable" award is misplaced.*

Part B of Millen Roofing's brief on cross-appeal is offered *support* for the trial court's decision to grant relief on its equitable counterclaim. This order was *affirmed* by the trial court.[6] Accordingly, this part of Millen Roofing's argument does not belong on cross appeal and should not be considered by this Court.

D. The trial court did not err in granting the Stokes' motion for summary disposition.

As the appellant with respect to the trial court's December 2, 1994 order, Millen Roofing bears the burden of persuasion on appeal. Because the Stokes, as cross-appellees, are in position to respond only to those arguments actually made by Millen Roofing, this Court should not reverse the Court of Appeals resolution of the issue on cross appeal unless it is persuaded by one of Millen Roofing's arguments. As set forth above, Millen Roofing's arguments are all either (1) legally flawed, (2) factually unsupported, or (3) not preserved for appeal. Accordingly, this Court should affirm the Court of Appeals resolution of the issue on cross-appeal.

To the extent that this Court looks beyond Millen Roofing's arguments, the Stokes contend that the trial court did not err in granting their motion for summary disposition. Section 2412 of the Occupation Code unequivocally prohibits unlicensed builders from suing to recover compensation for residential contracts:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the

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[6] For the reasons set forth in the Stokes brief on appeal in the other portion of this case, the Stokes contend that the trial court erred in awarding of equitable relief on Millen Roofing's amended counterclaim.

> performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [MCL 339.2412(1).]

The prohibition applies equally to counter-complaints made by defendants. See *Kirkendall v Heckinger*, 403 Mich 371, 374; 269 NW2d 184 (1978); *Parker, supra*, 124 Mich App at 471. Because it is undisputed that Millen Roofing did not allege, and could not prove, that it was a licensed residential builder, Millen Roofing's claim was deficient as a matter of law, and the trial court's ruling was correct. MCL 339.2412(1); *Kirkendall, supra*.

E. The trial court correctly discharged the invalid construction lien without requiring the Stokes to compensate Millen Roofing.

Although Millen Roofing makes no concerted argument that the trial court erred in discharging its construction lien against the Stokes, it briefly suggests that the trial court "should have imposed equity" at the time that it discharged the lien. Millen Roofing's suggestion is apparently based on *Republic Bank v Modular One PLC*, 232 Mich App 444, 455; 591 NW2d 335, where the Court of Appeals held that a plaintiff seeking to remove an invalid construction lien was required, as a matter of equity, to pay lien claimant as a "precondition" to the removal of the invalid construction lien.[7] In deciding *Republic Bank*, the Court of Appeals relied on the equitable maxim that one seeking equity (*i.e.*, an unclouded title), must do equity.

[7] As an unlicensed contractor, Millen Roofing lacked the authority to record a construction lien on the Stokes' property. Section 114 of the Construction Lien Act, provides that a contractor "shall not have a right to a construction lien" for an improvement to a residential structure unless there is a written contract between the parties setting forth that the contractor is duly licensed. MCL 570.1114.

Notwithstanding *Republic Bank*, there are at least three reasons why the trial court should *not* be reversed for discharging Millen Roofing's invalid construction lien without first requiring that the Stokes to compensate Millen Roofing for its work on the roof.

First, Millen Roofing *never asked* the trial court to require payment of the contract price as an equitable "precondition" to removal of the lien. In response to the Stokes' motion for summary disposition, Millen Roofing argued only that it did not need a license and that the doctrine of equitable estoppel should prevent the Stokes from raising the lack of a license as a defense. Regarding the lien, Millen Roofing asserted only that the lien was valid and that the Stokes could remove the lien by posing the requisite bond.[8] (Cross-Appellant's Appendix, pp 58b-69b.) Because Millen Roofing failed to raise the question whether equity required that it be compensated for its work as a "precondition" to the removal of the lien at a time when the trial court was in a position to consider granting such relief, it should not be permitted to do so now. *Peterman, supra* at 183; *Napier, supra* at 227-229.

Second, Michigan courts have long recognized that equity should not permit a party to obtain indirectly that which the law prohibits it from obtaining directly. For instance, in *Daley, supra* at 436, a bank sought an equitable set-off of municipal bonds against public funds deposited by the municipality. The Court held that allowing an equitable set-off would be "in effect to countenance, in an indirect manner, the seizure of the property of the village or city in a similar manner as if by attachment, garnishment or execution," which was prohibited by law. The Court then explained that "[e]quity as a rule will follow the law, and will not permit that to be done by indirection which,

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[8] On appeal, Millen Roofing has abandoned its argument that the lien was valid.

because of public policy, cannot be done directly." See also *Corkins v Ritter*, 326 Mich 563, 568; 40 NW2d 726 (1950); *Bennos v Waderlow*, 291 Mich 595, 600; 289 NW2d 267 (1940); *League General Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802, 806; 432 NW2d 751 (1988).

Here, if the trial court had ordered the Stokes to pay Millen Roofing the contract price as an equitable precondition to removal of the invalid construction, then equity would have indirectly permitted Millen Roofing to obtain compensation for the slate roof. This result would be contrary to the clear public policy of this State—as embodied by § 2412—that an unlicensed residential builder should not recover compensation. By prohibiting unlicensed residential builders from suing to recover compensation for their acts or contracts, § 2412 imposes the risk of total loss as a penalty for not obtaining the proper license. Imposing an equitable award of compensation to Millen Roofing as a precondition to the removal of the construction lien would have improperly defeated this legislative policy. "A court of equity has no more right than a court of law to act on its own notion of what is right in a particular case; it must be guided by the established rules and precedents. Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity." 27A Am Jur 2d, Equity, § 109; see also See *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993) ("Where, as in the present case, a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere."); *Majurin v Dep't of Social Services*, 164 Mich App 701, 707; 417 NW2d 578 (1987) ("Equitable principles cannot be applied in derogation of an unambiguous legislative requirement.").

Third, a court may not award equitable relief to a party with "unclean hands." This Court described the parameters of the clean hands doctrine in *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975):

> "No citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands." *Charles E. Austin, Inc v Secretary of State,* 321 Mich 426, 435; 32 NW2d 694 (1948). The clean hands maxim is an integral part of any action in equity. The United States Supreme Court captured the essence of the maxim when it said:
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> > "[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v Heath,* 6 How [47 US] 228, 247 [12 L Ed 416 (1848)]." *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co,* 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1944).
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> Since the clean hands maxim is designed to preserve the integrity of the judiciary, courts may apply it on their own motion even though it has not been raised by the parties or the courts below. See *Gaudiosi v Mellon,* 269 F2d 873, 881-882 (CA 3, 1959). See also *Hall v Wright,* 240 F2d 787, 795 (CA 9, 1957); *Frank Adam Electric Co v Westinghouse Electric & Mfg Co,* 146 F2d 165, 167 (CA 8, 1945).

An award of compensation to Millen Roofing as a precondition to the removal of the invalid construction lien would have violated the clean hands maxim.

Millen Roofing violated Michigan law by acting as a residential builder without the proper license. In 1994, when Millen Roofing built the Stokes' slate roof, § 601 of the Occupational Code provided as follows:

> (1) *A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the*

person possesses a license or certification of registration issued by the department for the occupation.

(2) Same; operating barber college, school of cosmetology, real estate school. A school, institution, or person shall not operate or attempt to operate a barber college, school of cosmetology, or real estate school unless the school, institution, or person is licensed or approved by the department.

(3) *Violation; penalties. A person,*[9] *school, or institution which violates subsection (1) or (2) is guilty of a misdemeanor, punishable by a fine of not more than $ 500.00, or imprisonment for not more than 90 days, or both.*

(4) Subsequent violations; penalties. A person, school, or institution which violates subsection (1) or (2) a second or any subsequent time is guilty of a misdemeanor, punishable, except as provided in section 707(2), by a fine of not more than $ 1,000.00, or imprisonment for not more than 1 year, or both.

(5) Investigation; additional sanctions. An investigation may be conducted under article 6 to enforce this section. A person who violates this section shall be subject to the strictures prescribed in this section and section 506. [Former MCL 339.601 (emphasis added).]

Therefore, subject to the limited statutory exceptions set forth in MCL 339.2403, a builder performing work a residential structure without a license is guilty of a crime.

Here, the undisputed facts demonstrate that Millen Roofing committed a crime when it built the Stokes' roof without the proper license. In addition to committing a misdemeanor and losing its right to sue for compensation, Millen Roofing was subject to a civil fine up to $10,000.00. See MCL 339.602(e); MCL 339.604. Additionally, as an unlicensed contractor, Millen Roofing lacked authority to record a construction lien on the Stokes' property. Section 114 of the Construction Lien Act provides that a contractor "shall not have a right to a construction lien" for an improvement to a residential structure unless there is a written contract between the parties setting forth that the

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[9] "'Person' means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those legal entities" MCL 339.105(5).

contractor is duly licensed. MCL 570.1114. Because Millen roofing's conduct with respect to the roofing job at issue was tainted by these violations of Michigan law, the clean hands maxim would have prevented the court from ordering the payment of compensation as an equitable precondition to the removal of the lien. *Stachnik, supra* at 382-383.

As the Court of Appeals recognized below, permitting unlicensed builders to obtain compensation as a precondition to the removal of invalid construction liens would *reward* unlicensed builders for filing invalid liens and permit them to cleverly avoid the penalty contemplated by § 2412. Under such a scheme, an unlicensed contractor would merely have to record an invalid lien against the homeowner's property in hopes that the homeowner would then file an equitable action to "quiet title." In response to such an action, the contractor could then argue that the homeowner's "equitable action" required the court to examine the "equities" of the case, and that it would be "inequitable" to deny it payment for the work performed on the property. Because the unlicensed builder's route to compensation requires both a violation of the law and the filing of an invalid lien, equity should not countenance such behavior.

As a final matter, the Stokes contend that this Court's decision in *Kirkendall, supra,* did not require the trial court to award of equitable relief to Millen Roofing as a precondition to the removal of the lien. In *Kirkendall*, this Court held that equitable principles obliged a plaintiff seeking a real estate conveyance to reimburse the defendant for "reasonable expenditures for improvements on the property" made while defendant was an equitable mortgagee. *Kirkendall* is notable because the Court reached this conclusion despite the fact that defendant also made the improvements while acting as an unlicensed residential builder. Frank Kirkendall purchased a lot on which he planned

to build a house for his son Dennis Kirkendall. Carl Heckinger agreed to pay off the land contract on the house, to pay the back taxes, and to build a house on the lot in exchange for a sum of money. When a dispute arose over the sum of money, the Kirkendall's filed suit seeking equitable relief in the form of a conveyance of the property for a certain sum of money or, in the alternative, money damages. Heckinger filed a counterclaim seeking reimbursement for the value of the labor and improvements made to the property. The trial court dismissed Heckinger's counterclaim on the ground that it violated § 16 of the Residential Builder's Act—a provision substantially the same as the current § 2412. The Court of Appeals affirmed.

This Court affirmed the dismissal of Heckinger's counterclaim, but concluded that Heckinger was entitled to recover for the value of the improvements made while he had title to the property as a condition of the grant of equitable relief to Dennis Kirkendall. Such a result, it reasoned, would be consistent with the maxim that one seeking equity (*i.e.*, the Kirkendalls) must do equity. Accordingly, on the specific authority of Osborne, Mortgages, §§ 169-170, and 4 Pomeroy's Equity Jurisprudence (5th ed), § 1217, the *Kirkendall* Court held that Heckinger, as an equitable mortgagee, was "entitled as a condition to reconveyance to reasonable expenditures for improvements on the property" made while he had title to the property. *Kirkendall*, *supra* at 374. The key distinction between *Kirkendall* and the instant case is that Millen Roofing did not have the status of "equitable mortgagee" with respect to the Stokes. Therefore, Millen Roofing is not entitled to recover equitable relief under the controlling theory of *Kirkendall*. Accordingly, this Court need not overrule *Kirkendall* to rule in favor of the Stokes.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, this Court should AFFIRM the Court of Appeals with respect to the issues properly raised on cross-appeal.

Respectfully submitted,

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